Sawarn Singh a/l Mehar Singh v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42S-30–11 OF 2011
ABDUL KARIM JC
1 MARCH 2013

Criminal Law — Cheating — Dishonesty — Dishonestly inducing payment to obtain examination papers — Whether fact transaction was illegal absolved accused of cheating charge — Whether person who paid inducement money was victim or accomplice — Whether mitigating factors existed for reduction in accused's jail term

The appellant, who at the material time was an aircraft maintenance engineer with the Malaysian Airlines System ('MAS'), was convicted by the sessions court and sentenced to two years' jail and ordered to be given three strokes of the rotan for an offence of cheating under s 420 of the Penal Code. He was found guilty of dishonestly inducing an 18-year-old boy to pay him RM3,000 in order for the appellant to supply him with examination papers set by MAS for its aircraft maintenance trainee and cadet pilot programmes ('the jobs'). According to the prosecution evidence, SP2 and his two friends had done well in their SPM examinations and were interested in applying for the jobs advertised in a newspaper. Through a contact, they met the appellant for further information and advice. The appellant told them that as an employee of MAS he could recruit four or five of his relatives or close friends for the jobs under the company's 'family package'. He said candidates vying for the jobs under the 'family package' had to pay RM3,000 for the question papers and another RM2,000 for the interview session at MAS. He advised the trio to first pay the initial sum of RM3,000 into his bank account and he gave them the details. Whilst his two friends withdrew from the 'deal' after consulting their parents, SP2 went ahead and banked in the money into the appellant's account. He never got the job or his money back despite repeated calls to the appellant. Witnesses from MAS testified there was no such thing as a 'family package'. In his instant appeal against conviction and sentence the appellant, inter alia, contended that SP2 paid the money voluntarily as a bribe and that no deception was involved; that SP2 was an accomplice and his evidence should be treated with caution and not be accepted without corroboration.

Held, dismissing the appeal against conviction but reducing the appellant's jail term to one year and retaining the sentence of whipping:

(1) SP2 was a victim and not an accomplice in the offence of cheating against

the appellant. The fact that the transaction involved was allegedly illegal or tainted with illegality did not ipso facto take it out of a cheating charge (see paras 17–18).

(2) On the factual matrix, the representation made by the appellant to SP2 was without doubt false. The prosecution had adduced clear evidence to show there was no such practice called 'family package' in MAS. The appellant had acted dishonestly to induce SP2 to part with the RM3,000 and SP2 suffered damage as a result of the deceit. The trial judge's finding on this issue was well supported by the evidence and there was no reason to interfere with his decision (see para 16).

(3) The appellant's defence was tainted, unreasonable and did not command confidence and failed to raise a reasonable doubt on the prosecution case. The trial judge's decision on the appellant's case was correct (see para 24).

(4) The trial judge had failed to consider that the appellant had suffered more than enough and that he had lost everything. This was a weighty mitigating factor to allow the reduction of the imprisonment term to one year (mandatory). The sentence of whipping was retained (see para 25).

[Bahasa Malaysia summary

Perayu, yang pada masa material adalah jurutera penyelenggaraan kapal terbang dengan Malaysian Airlines System ('MAS'), disabitkan oleh mahkamah sesyen dan dihukum dua tahun penjara dan diperintahkan diberi tiga sebatan rotan untuk kesalahan menipu di bawah s 420 Kanun Keseksaan. Dia didapati bersalah kerana secara tidak jujur memujuk budak lelaki berumur 18 tahun membayar kepadanya sejumlah RM3,000 supaya perayu dapat membekalkannya dengan kertas-kertas peperiksaan yang ditetapkan oleh MAS untuk pelatih penyelenggaraan dan program kadet juruterbang ('pekerjaan tersebut'). Mengikut keterangan pihak pendakwaan, SP2 dan dua orang kawannya telah berjaya dalam peperiksaan SPM mereka dan berminat dalam untuk memohon kerja-kerja yang diiklankan di dalam surat khabar. Melalui orang hubungan mereka berjumpa dengan perayu untuk maklumat dan nasihat selanjutnya. Perayu memberitahu mereka sebagai pekerja MAS dia boleh merekrut empat atau lima saudara maranya atau kawan rapat untuk kerja-kerja di bawah 'family package' syarikat. Dia menyatakan calon-calon yang bersaing untuk bekerja di bawah 'family package' terpaksa membayar RM3,000 untuk kertas-kertas soalan dan RM2,000 lagi untuk sesi temuduga di MAS. Dia menasihatkan ketiga-tiga budak tersebut untuk membayar jumlah permulaan terdahulu sejumlah RM3,000 ke dalam akaun banknya dan dia memberi kepada mereka butirnya. Sementara kawan-kawannya menarik diri daripada 'deal' selepas berbincang dengan ibubapa mereka, SP2 meneruskan dan membayar wang ke dalam akaun perayu. Dia tidak mendapat kerja dayn wangnya semula meskipun berkali-kali membuat panggilan kepada perayu. Saksi-saksi daripada MAS memberi keterangan bahawa tidak ada

perkara seperti 'family package'. Dalam rayuannya terhadap sabitan dan hukuman perayu, antara lain, berhujah bahawa SP2 membayar wang tersebut secara sukarela sebagai rasuah dan tiada penipuan terlibat; bahawa SP2 adalah rakan sejenayah dan keterangannya patut dipertimbangkan dengan berhati-hati dan tidak boleh diterima tanpa sokongan.

Diputuskan, menolak rayuan terhadap sabitan tetapi mengurangkan tempoh penjara perayu kepada satu tahun dan mengekalkan hukuman sebatan:

(1) SP2 adalah mangsa dan bukan rakan sejenayah di dalam kesalahan menipu terhadap perayu. Fakta bahawa transaksi terlibat adalah salah dari segi undang-undang atau tercela dengan kepenyalahan undang-undang tidak secara ipso facto telah melepas kahnya daripada tuduhan menipu (lihat perenggan 17–18).

(2) Atas matriks fakta, representasi yang dibuat oleh perayu kepada SP2 tanpa kesangsian adalah penipuan. Pihak pendakwaan telah mengemukakan keterangan jelas bahawa tiada amalan sedemikian dikenali sebagai 'family package' dalam MAS. Perayu telah bertindak dengan tidak jujur untuk memujuk SP2 memberikan wang berjumlah RM3,000 dan SP2 mengalami kehilangan akibat penipuan tersebut. Dapatan hakim perbicaraan atas isu ini adalah disokong dengan keterangan dan tidak ada sebab untuk campur tangan dengan keputusannya (lihat perenggan 16).

(3) Pembelaan perayu dicela, tidak munasabah dan tidak memberikan keyakinan dan gagal untuk membangkitkan keraguan munasabah ke atas kes pihak pendakwaan. Keputusan hakim perbicaraan ke atas kes perayu adalah betul (lihat perenggan 24).

(4) Hakim perbicaraan telah gagal untuk mempertimbangkan bahawa perayu telah cukup menderita dan dia telah hilang kesemuanya. Ini adalah faktor mitigasi yang kukuh untuk membenarkan pengurangan tempoh penjara kepada satu tahun (mandatori). Hukuman sebatan dikekalkan (lihat perenggan 25).]

Notes

For cases on dishonesty, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 68–69.

Cases referred to

Chean Siong Guat v PP [1969] 2 MLJ 63, (refd)
In the matter of, SR Narsimlu & Anor [1973] Cri LJ 1481, HC (refd)
Loh Liang Gun & Anor v PP [2007] 5 MLJ 159, CA (refd)
Meera v Emperor (1917) Cri LJ 105, 18 CrLJ 362 (refd)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135 (refd)

Mohd Jalani bin Saliman & Anor v PP [1997] 5 MLJ 551; [1998] 1 CLJ 123, HC (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379, FC (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
R v Lim Cheng Soo [1946] 1 MLJ 51 (refd)
Seaward v PP [1994] 3 SLR 369, HC (refd)
Wee King Hock & Ors v PP [1971] 2 MLJ 96, FC (refd)
Yacco v The Emperor (1933) 34 Cri LJ 1255 (refd)

Legislation referred to

Anti-Corruption Act 1997 (replaced by Malaysian Anti-Corruption Commission Act 2009) s7(2), (3)
Criminal Procedure Code ss 182(g), 377(b)
Penal Code ss 15, 420

Avtar Singh (Amarjeet Singh with him) (Avtar) for the appellant.
Abdul Ghafar bin Ab Latif (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Abdul Karim JC:

[1] The appellant, Sawarn Singh a/l Mehar Singh, was charged in the Sessions Court at Kluang for the offence of cheating under s 420 of the Penal Code as follows:

> Bahawa kamu, pada 3 April 2006 jam lebih kurang 9.31 pagi, bertempat di Maybank Kluang, di alamat No. 30-34, Jalan Dato' Haji Hassan, dalam Daerah Kluang, dalam Negeri Johor Darul Takzim, telah menipu Ajitpal Singh A/L Gurdev Singh dengan tidak jujur mendorong Ajitpal Singh A/L Gurdev Singh menyerah kepada kamu suatu harta, iaitu wang tunai sebanyak RM 3,000.00 yang dimasukkan ke dalam akaun Maybank milik kamu bernombor 155108672865 secara online di Maybank Kluang, Johor iaitu dengan secara curang memberitahu Ajitpal Singh A/L Gurdev Singh bahawa wang tersebut adalah bagi memboleh kamu membocorkan soalan kertas peperiksaan pra kelayakan bagi jawatan Aircraft Maintainance Trainee dan Pilot yang dikendalikan oleh MAS dan penyerahan wang itu tidak akan berlaku sekiranya beliau tidak terpedaya dengan pemberitahuan curang kamu itu dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 420 Kanun Keseksaan.

[2] He claimed trial, and on 3 November 2011, the court found him guilty, entered a conviction and sentenced him to two years' imprisonment with three strokes of rattan. He appealed against both his conviction and his sentence to this court and on 27 December 2012, I dismissed his appeal on his conviction, but reduced his sentence of imprisonment from two to one year's

imprisonment. The rattan, however, remains. Upon application, the court granted him a stay of the above decision pending the disposal of his appeal in the Court of Appeal.

[3] Strip to essentials, it was the prosecution case that Ajitpal Singh a/l Gurdev Singh ('SP2') ('the complainant'), Karampal Singh a/l Gurvinder ('SP8') and Yuvaneshwaran a/l Chandran were good friends ('the Trio'). After passing their SPM examinations with flying colours, the trio got to know of an advertisement in the *Utusan Malaysia* and *The Star* newspapers depicting a catchy tag line '5-Star Airline Seeks 5-Star Individual' inviting young and qualified young men to apply for MAS's comprehensive programmes (jobs) for cadet pilot and aircraft maintenance trainee. The trio got so excited and anxiously interested to apply for the jobs. But, they needed further advice on how to go about doing it. It then struck SP8 to consult his father who thereafter recommended that they called one Sawarn Singh a/l Mehar Singh, the appellant, who was at that material time a MAS's aircraft maintenance engineer. In the presence of his two friends, SP8 immediately called the appellant via his cellphone. In the course of SP8's telephonic conversation with the appellant, SP2 overheard something about a package and money of about RM3,000 and RM5,000. Upon SP2 further enquiry, SP8 conveyed the information that the advertisement in the media was meant for the public and that as a staff of MAS, the appellant could recruit four to five of his relatives or close acquaintances for the programme under an internal practice called 'family package'. On the issue of the qualifying age barrier of 20–24 years old for both programmes, SP2 got the impression that under the family package deal, the qualifying age was 18 years old. As to the sum of money, they got to know further that about a total of RM5,000 was for the family package. The RM5,000 comprised of RM3,000 which was meant for question papers and RM,2000, for the interview session with MAS. They were not clear and needed further clarification and decided to see the appellant personally.

[4] Before the planned meeting, SP8 called the appellant about their desire to meet him for further clarification. The appellant agreed to see them on 2 April 2006, at about 4pm at the Bistro Palma Restaurant, Nilai, Negeri Sembilan. The appellant also asked them to bring along all relevant documents such as resume, certificates, passport size photographs and copies of their identification cards. The trio went and met the appellant at about 4.30pm at the above agreed restaurant. They also brought along with them all those requested documents. During the meeting, the appellant told them about his career as an aircraft engineer in MAS. And, about the family package, the appellant explained that the RM3,000 was for the payment of question papers and the RM2,000 was meant for the interview session. SP2 was so confident with the appellant. After giving the requested documents to the appellant, the trio enquired as to when they would be called by MAS once the payments were

made. The appellant assured them that it would be in July 2006. The trio expressed their concerns over the big sum of RM5,000; the appellant nevertheless told them that they could make the first payment of RM3,000 for the question papers because the same papers would be used by MAS. The appellant also indicated that the said amount was meant for some people at the top in order to acquire the question papers under the family package. The trio also asked as to when and how they could make the payment and whether there was such assurance that they could get the jobs. The appellant informed that they should not worry about that, and he would take care of the matter with MAS. The appellant further informed that they could make the payment into his Maybank account via online using his account numbers that he wrote on a piece of paper.

[5] Satisfied with the meeting, the trio went back and informed their parents about the outcome of the above meeting. SP8 and Yuvaneshwaran's parents smell a rat and believed that it was a scam. SP8 and Yuvaneshwaran thereafter withdrew. SP2 nevertheless still had full confidence in the appellant and believed that the appellant would endeavour to help him. With the blessing of his parents, SP2 had, on 3 April 2006, gone to the Maybank Kluang, Johore, and bank-in via counter the sum of RM3,000 into the appellant's bank account. On that very night, SP2 informed the appellant about the RM3,000 payment which he had paid into his account. The appellant asked him to wait and SP2 had been waiting ever since. He did not get the job and despite repeated demands, he failed to get his money back from the appellant as well.

[6] The prosecution also called witnesses from MAS who categorically confirmed that there was no such internal practice called the 'family package'.

[7] The appellant's learned counsel raised several grounds of appeal and divided his submissions into three major parts viz the prosecution was tainted for want of authority; the prosecution has failed to prove its case; and, the sentence as ordered was wrong in law.

[8] As to the first part, learned counsel's submission that the prosecution was tainted for want of authority is misconceived. This issue on the nullity of the trial against the appellant was first raised by the then appellant's counsel ie Mr Karpal Singh on 22 April 2010. The crux of Mr Karpal's preliminary objection was that the offence under s 420 of the Penal Code did not fall within the prescribed offences under the then Anti-Corruption Act 1997 ('APR 1997'). On May 27, 2010, the then learned counsel, however, after being referred to the provisions of s 7(2) and 7(3) of the APR 1997, withdrew, and rightly so, his preliminary objection (vide p 21/22 of the appeal record). The appellant's present learned counsel, however, regurgitated this issue again but now to support the proposition that the conduct of the prosecution was a nullity on

A the ground that the officer conducting the prosecution was not duly authorised in writing by the public prosecutor under s 377(b) of the Criminal Procedure Code. The court, upon further enquiry, discovered that the public prosecutor via Dato' Abdul Razak bin Musa, deputy public prosecutor, had issued such written authorisation, exh P1A, to the officer conducting the prosecution ie B PPj Sevan a/l K Ponan. It appears that the Kluang Court registry had earlier inadvertently overlooked to have the said exh P1A included in the appeal record. Hence this issue is a non starter and should be dismissed in limine.

C **[9]** In the second part of his submission, learned counsel contends that the prosecution has failed to prove the most important and critical element of the charge ie the practice of deception on SP2, and hence non inducement on SP2 to deliver, or part with the RM3,000. Learned counsel further contended that SP2 made the payment on his own free will and was not as a result of being so D deceived by the appellant because SP2 already knew the reason for the meeting and that the time for him to apply for the post had lapsed. Nevertheless he was so desirous of getting the job, and towards that he would try all means even to ghastly participating in any wrongful acts including to partake in the bribing of the MAS's official or even to defraud MAS. E

[10] Learned counsel further contended that in so doing SP2 is an accomplice and his evidence must be viewed and considered with suspicion. And, his evidence must be corroborated in the true sense of the principle on F corroboration. In the present case SP2 is said to be so incredibly not worthy of believing because of the many materially glaring inconsistencies and contradictions in his evidence.

[11] Learned counsel strenuously argued that the elements of the deception, G dishonesty, inducement, and the resulting parting of the property must all be proven to have taken place in the sequential order of things and time in showing the nexus of these elements to each other. The prosecution, according to learned counsel, has failed to prove all those elements. Emphasising further, the fact that there was a serious contradiction in the actual date of the H concerned meeting ie second or third of April 2006, has caused the prosecution case to collapse.

[12] I will deal with the above issues accordingly.

I

[13] In establishing a case for cheating under s 420 against the appellant, the respondent must prove that there was a delivery of property to the appellant; the appellant induced SP2 to deliver that property to him; SP2 acted upon such inducement in consequence of the appellant's deceit; the appellant acted

dishonestly in so inducing SP2 to part with the property; and SP2 suffered damage or harm as a result of the deceit (see *Loh Liang Gun & Anor v Public Prosecutor* [2007] 5 MLJ 159).

[14] It cannot be gainsaid that 'deception' and 'dishonestly inducing one's so deceived to part with property' are the quintessence of the offence of cheating. Section 15 of the Penal Code provides that:

> 415 Whoever by deceiving any person, whether or not such deception was the sole or main inducement-
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> (a) Fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or
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> (b) Intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,
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> is said to 'cheat'.

In the case of *Mohd Jalani bin Saliman & Anor v Public Prosecutor* [1997] 5 MLJ 551; [1998] 1 CLJ 123, Abdul Malik J (as he then was) in his illuminating exposition of the law says:

> There must be deception. That deception must be caused by the accused to generate inducement in the mind of the victim. Deception may be by words or conduct. What is sufficient deception is dependent on the facts of each case. Deception has an element of misleading. It is inducing a person to believe as true something which is false. … That deception is an essential ingredient can never be doubted. Ali J in *Mohamed Bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135 was correct when he held the view that to sustain a charge of cheating, there must be evidence of deception practiced upon a person who was dishonestly induced to part with his money (at p 140);
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> In short, the offence of cheating is completed once the culprit obtains possession of the property by a trick (Dick GW (AIR (A) 538; *Sharbly bin Ahmad v Public Prosecutor* (*Mallal's Digest* at p 405 para 1260) — at p 141.

So too in *Seaward v Public Prosecutor* [1994] 3 SLR 369, at p 377 Yong Pung How CJ says:

> With respect to the issue of inducement, it is trite law that there can be no offence of cheating unless the deception operating upon the victim's mind, and by reason of that deception, he is induced to part with property. In this case, Lim testified that, in reliant upon the invoice, he had approved the hire purchase financing. In my view, there was no doubt that, by reason of the deception, Lim had been induced to approve the transaction. The defence contended that the financing was approved with CCC's good financial standing, ability to pay and the directors' personal

guarantees in mind, and that the deception did not induce Lim into approving the transaction. On this point, I felt it immaterial that the false pretence was not the sole, operative reason why HLF parted with its money. As long as the deception played some part in inducing HLF to approve the financing, the element of 'inducement' within s 415 would have been satisfied.

[15] Has the prosecution established that there was deception on SP2 by the appellant and that in consequence of that deception the appellant had induced SP2 to deliver the RM3,000? On such deception, was SP2 induced to believe whatever the appellant had represented as true which in fact the appellant knew that it was false? After considering the evidential matrix of the case as established by the prosecution and the facts proved thereof, I have no doubt in my mind that there was deception practiced by the appellant on SP2. It is to be noted that SP2 and his friends were young boys who had just passed their SPM examinations with flying colours. And, upon reading the catchy and promising MAS's advertisement, they were so desirous of wanting to join in the programme. There is nothing uncommon or extraordinary about that. So eager were they, they contacted and arranged a meeting on 2 April 2010, with the appellant to seeking further assistance as to how to get into the said programme. With such eagerness, SP2 and friends believed whatever the appellant had said as true. After all he was an aircraft maintenance engineer in MAS, a true and life model. SP2 firmly believed that there was such a family package for internal staff, the appellant being one of them, to bring in three to four family members or close acquaintances to apply for the engineering maintenance trainee programme and that the age qualification as stated in the advertisement did not apply for this category of applicants (under the family package). The appellant further assured SP2 and friends that he would take care of everything. But in order to successfully go through the set procedures, examination, tests and interview, SP2 and friends were told of some payments that needed to be paid. The appellant said that they had to pay RM10,000 for an application for cadet pilot, and RM5,000 for the engineering maintenance trainee. As for the Cadets Pilot Programme, the said amount was for the following: RM5,000 was for the supply of the questions papers set by MAS; and, another RM5,000 was for the interview session. As for the Engineering Maintenance Trainee Programme, RM3,000 was for the same set of examination questions (which was common to both); and, another RM2,000 was for the interview session. Being the most gullible, SP2 got so excited and convinced that the appellant's representation was true. After getting his parents' agreement, SP2 agreed to pay for the first RM3,000 for the supply of the examination questions. Immediately that was what he did the first thing in the morning the day after the said meeting. He paid the RM3,000 via counter into the appellant's account. SP2 in his evidence categorically said that he would not pay the money if he knew that the appellant was not able to deliver the promise and if he knew that what the appellant had said was not true. He was so deceived and thereafter was so induced to part with his RM3,000.

[16] The prosecution has also adduced clear evidence to show that there was no such practice called family package in MAS. All MAS's witnesses had categorically denied, upon being cross-examined, on the existence of such a practice. On this factual matrix, the representation made by the appellant to SP2 is without any doubt false. In the circumstances, the appellant must have known that there was no such thing as family package as against the set procedures as advertised in the newspapers. It must but false representations. The SP2, the most gullible and weak among the trio, succumbed to such representation and that had caused him to part with his RM3,000 which went into the appellant's account and never return! The appellant hence acted dishonestly in so inducing SP2 to part with the said RM3,000 and SP2 suffered damage as a result of the said deceit.Thus the learned trial judge's finding on this issue is well supported by the evidence and I do not see any reason to interfere with his decision.

[17] On the accomplice issue and the alleged SP2's knowledge of the illegality of the transaction, the law on this is trite. SP2 is a victim and not an accomplice for the offence of cheating preferred against the appellant. It would be otherwise if the appellant or the concerned MAS's officials are charged for any other offence such as corruption where SP2 might be considered as an accomplice. It is trite law that an accomplice is a person who has either participated or concerned in the commission of an offence. See *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379. It is beyond imagination that SP2 could be considered as an accomplice in the circumstances of this case. As earlier found, what had been represented to SP2 was false because there was no such practice or thing as family package or payment for the alleged question papers or interview session. Though excited and ambitious, that does not make SP2 by any stretch of the imagination an accomplice. In the above circumstances, he was a victim of the appellant's scam on weak and gullible young man.

[18] So too, the fact that the transaction involved is allegedly illegal or tainted with illegality does not ipso facto take it out of a cheating charge. In *R v Lim Cheng Soo* [1946] 1 MLJ 51, a s 420 case, where the accused was concerned in a contract to purchase forged notes. The presiding magistrate stopped the case under s 182(3) of the Criminal Procedure Code on a question of law and said 'I took the view that the complainant's transaction, a purchase or an attempt to purchase forged notes, was in fact quite illegal. It was not an agreement which could not be enforced in any Civil Court and it could not support a criminal prosecution for cheating'. The magistrate decision was held to be wrong. It was held that a prosecution would lie for cheating in the course of a transaction to purchase a forged note, if a party to the transaction is found to have committed it. McElwaine CJ, at pp 51–52, says that:

A This is not a proceeding to enforce an illegal contract or to recover money paid for an illegal consideration. It is as the record shows, a prosecution on behalf of the King.

In *R v Tan Ah Seng* a court of three judges held that a prosecution would lie for criminal misappropriation of money entrusted to the accused for a criminal purpose. I see no reason why a man should escape punishment for a crime because he has conspired with a complainant to commit the same or another offence.

Mr Butterfield referred to a note on RV Verteul and Whelan in Vol 2 of the *Journal of Criminal Law*. The accused were convicted of defrauding one Guylee of sum of money by representing that the money was required 'to grease the wheels at the police court' or in plain English to be used for bribing. The appeal is allowed.

See *Wee King Hock & Ors v Public Prosecutor* [1971] 2 MLJ 96, a s 420 conviction involving a transaction of illegal business involving gold which the complainant was clearly informed.

The position is likewise in India as shown in the following cases:

(a) *Yacco v The Emperor* (1933) 34 Cri LJ 1255 — The accused represented that he could influence the court in their favours and received money for that. They pleaded illegality and the parties induced as accomplices. The defence was rejected because, inter alia, the case was not against the magistrate for bribery.

(b) *In the matter of, SR Narsimlu & Anor* [1973] Cri LJ 1481; and

(c) *Meera v Emperor* (1917) Cri LJ 105.

Hence to impute such characteristics of an accomplice and the alleged illegality of the transaction on SP2 to taint his credibility is not supported by the above authorities. Unless there are clear material inconsistencies or contradictions in SP2's evidence, which I found none here, as found in the *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135 case, the submission by learned counsel on this issue is untenable.

[19] On the alleged contradiction on the date of the concerned meeting viz on 2 April 2006, or 3 April 2006, this issue is one of the most critical issues raised by the appellant. If accepted, as claimed by learned counsel, the case for the prosecution would fall. After perusing the entire evidence with anxious consideration, I, however, find that there is no such material contradiction, inconsistency or dishonest confusion as contended by learned counsel. As I see it, it is just an honest mistake and honest confusion from an honest witness ie SP8. From the authorities on assessment of witnesses' credibility, mistakes, contradictions or inconsistencies will always be there, and upon the meticulous eyes of a serious advocate, there will always be an imperfect witness or witnesses (see *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63; *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234).

[20] I say that the apparent contradiction is an honest mistake because SP8, at p 39 of the appeal record says that: A

> Pada malam tersebut Ajitpal telepon saya dan dia beritahu akan buat bayaran RM3000 untuk dapat soalan bocor tersebut kerana dia yakin dengan kata-kata Sawarn Singh. Keluarga Yuvaneshwaran juga tidak setuju sebab mereka kurang yakin dengan proses tersebut Ajitpal beritahu dia akan buat bayaran keesokan harinya … B
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> Saya kemudian tahu Ajitpal telah bayar sebab dia sentiasa beritahu saya apa-apa perkembangan yang berlaku sebab dia kawan baik saya. Ajitpal kemudian telah bayar RM3000 tersebut. C

The so-called glaring mistake is only on the date of such meeting. The rest of SP8's evidence is clear of any material inconsistencies. As earlier mentioned, SP2 had, in his evidence, categorically testified that he had paid the RM3,000 into the appellant's Maybank account on the morning of 3 April 2006. The appellant did not deny this fact. So when SP8 said that SP2 informed him that he would be paying the money 'keesokan harinya' that could not be referring to 4 April 2006. D

[21] In the circumstances, there is no gap in the prosecution's case and the non calling of Yuvaneshwaran was therefore not fatal to the prosecution's case. E

[22] As to the confusion on the charge, exhs P5 and P10, I am of the view that there is a misunderstanding as to the true purport of the charge especially on the word 'Jawatan' which is in the following setting: F

> *… bagi memboleh kamu membocorkan soalan kertas peperiksaan pra kelayakan bagi jawatan Aircraft Maintenance Trainee dan Pilot yang dikendalikan oleh MAS …*

It is to be noted that payment was meant 'membolehkan kamu membocorkan soalan kertas peperiksaan pra kelayakan bagi jawatan'. The focus is not on the jawatan but on the 'membolehkan et seq'. From the evidence of both SP2 and SP8 the 'soalan bocor' is applicable to both programmes viz the same set is used for both applications. It should be noted as well that SP2 was interested in the Aircraft Maintenance Trainee Programme and SP8 was more about the Cadet Pilot Programme. Hence nothing turns on this. G H

[23] As to the mentioning of Yuvenashwaran's name in the trial judge's grounds of judgment, it is clearly a mistake on the part of the trial judge which does not in any way affect his judgment. The non usage of the word 'SP' preceding Yuvenashwaran's name supports the above proposition. Even after reading his entire decision, including at the end of the prosecution's case, the said mentioning is just a clear mistake and nothing more. Nothing turns on this as well. I

[24] On the defence case, I totally agree with trial judge's assessments and findings. I would even say that the appellant's evidence as adduced was well orchestrated by the appellant anticipating as he did about what was to come during his trial. It is my considered view that the letter D13 and the evidence of SD3 are useless as evidence and in the circumstances are purposely created to bolster the appellant's defence. In any event, D13 was well rebutted by the evidence of SP11. It was quite surprising when the appellant said that there was a second shift and normally marked in the book as D1! This was not even put to SP11. More importantly, there was no mentioning of his wife accompanying him to meet SP2 in his caution statement D14. As a whole, the appellant's evidence is tainted, unreasonable and does not command confident and therefore fail to raise any reasonable doubt in the prosecution case. In this respect, the trial judge's decision on the appellant's case is correct and it is trite law that I should be very slow to interfere.

[25] On sentence, after considering the circumstances of this case, I agree with the appellant's counsel submission that the appellant had suffered more than enough and that he has lost everything. To me this is a weighty mitigating factor which the learned trial judge has failed to consider. I therefore allow his appeal on sentence by reducing the imprisonment term from two years' to one year's (mandatory) imprisonment. I however retain the sentence of whipping as ordered by the learned trial judge.

[26] In the upshot, I dismiss the appellant's appeal on conviction. I, however, allow his appeal on sentence on terms as above announced.

Appeal against conviction dismissed but appellant's jail term reduced to one year and sentence of whipping retained.

Reported by Ashok Kumar